NO. 22614

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

APPLE VALLEY BUILDING AND DEVELOPMENT CO., INC.

Appellant,

vs.

BONANZA AIR LINES, INC.,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

MAXWELL & SHEAHAN
CLYDE R. MAXWELL
DANIEL R. SHEAHAN

437 South Hill Street
Suite 600
Los Angeles, Calif. 90013

ARTHUR M. TAYLOR

3737 E. Bonanza Way
Phoenix, Arizona

Attorneys for Appellee

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STATEMENT OF JURISDICTION

The jurisdiction of the District Court is based upon diversity of citizenship under Title 28 U.S.C. § 1332. Plaintiff and appellant, Apple Valley Building and Development Co., Inc. (hereinafter called "Apple Valley Co."), was a California corporation, since merged in The Reserve Oil and Gas Company, also a California corporation (Tr. 2; Appellant's Brief, p. 1). The principal place of business of both corporations was and is California (Tr. 2; Appellant's Brief, p. 1). Defendant and appellee, Bonanza Air Lines, Inc., (hereinafter called "Bonanza"), is a Nevada corporation with its principal place of business in Arizona (Tr. 32; 258). The amount in controversy, exclusive of interests and costs, exceeds $10,000 (Tr. 2).

The District Court granted Bonanza's Motion for Summary Judgment and Apple Valley Co. appeals (Tr. 266, 280). Apple Valley Co. sued to recover rent, ordinary landing fees and excess weight landing fees alleged due under the terms of a written contract for the period June 1, 1960, to November 30, 1965 (Tr. 2). Suit was instituted in February 1966 (Tr. 2). Bonanza conceded the amounts of space rental and ordinary landing fees due and paid into the Registry of the District Court the amount of $7,382.46 so that the only amount which remained in controversy is that related to excess weight landing fees (Tr. 224, 230). As to these fees, the District Court held that Apple Valley Co. waived excess landing weight fee provisions of the lease during the term of the lease and during the hold-over period by the agreement reached on April 22, 1960, and by its conduct thereafter (Tr. 263-4). This Court has jurisdiction of this appeal under Title 28 U.S.C. 1291.

STATEMENT OF THE CASE

Because the Statement of the Case made by appellant contains a recitation of facts and argument, much of which is not material or pertinent to the basis of the order granting summary judgment of the Court below, and which fails to refer at all to the Findings of Fact and Conclusions of Law entered herein, appellee submits a separate statement of the case in the following paragraphs, taken primarily from the findings of fact made by the Trial Court (Tr. 258 et seq.).

Appellant has instituted suit against appellee for rent and landing fees, including excess weight landing charges allegedly due the appellant under the terms of a written lease which was for the period July 1, 1957, to July 1, 1962, and for the subsequent period July 1, 1962, to November 30, 1965, during which period appellee was in occupancy of the same premises without written commitment (Tr. 2). It is alleged by the appellant that excess weight landing charges are due and unpaid for the period June 1, 1960, to November 30, 1965, and that space rental and basic landing fees are due for the period December 1, 1964, to and including November 30, 1965 (Tr. 3).

Appellee, by its Amended Answer, has denied liability, (Tr. 32 et seq.) except that, by its reply to the Opposition to the Motion for Summary Judgment, it has conceded space rental and basic landing fees to be due the appellant for the period December 1, 1964, to and including November 30, 1965, in the amount of $7,382.46 (Tr. 224, 230-1). Appellee has also, by its Amended Complaint, set up the Affirmative Defenses of Waiver and Estoppel, and the bars of the statutes of limitation for certain periods (Tr. 33-6).

Appellant, Apple Valley Co., during the period in question, owned and operated an airport at Apple Valley, California (Tr. 2). Appellant, subsequent to the institution of this action, became merged with The Reserve Oil and Gas Company (Appellant's Brief, p. 1).

Appellee, Bonanza, is an operating public carrier

serving many points in the Pacific Southwest area (Tr. 61).

During the year 1957, Apple Valley Co. and Bonanza entered into a lease which provided for airport space rental and landing fees and excess weight landing fees, to be paid by the appellee to the appellant. The lease was for a period of five years and expired on July 1, 1962. The lease contained no option or other provision for renewal (Tr. 5).

Appellee, Bonanza, initiated air service between Los Angeles, Apple Valley and Las Vegas, Nevada, in 1957, utilizing aircraft known as DC-3's, which had a certified gross landing weight of 25,000 pounds (Tr. 39, 48).

On April 22, 1960, a meeting was held at the facilities of Apple Valley Co. at Apple Valley, California, between Ralston O. Hawkins, General Counsel of Bonanza, Louis J. Arpin, Assistant to Vice President - Operations, of Bonanza, and William Barris, Airport Manager for Apple Valley Co. and William Sawyer, Vice President of Apple Valley Co. (Tr. 91, 94).

At said meeting the parties discussed the proposed initiation of service to the Apple Valley Airport by Bonanza of F-27A aircraft in place of DC-3 aircraft, on or about June 1, 1960. The representatives of Apple Valley Co. were advised of these plans and that the F-27A had a gross weight of 36,000 pounds (Tr. 91-2).

There also was discussed at that meeting the interpretation and application of Article 3(b) of the aforesaid lease and the representatives of Apple Valley were advised by

the Bonanza representatives that said Article 3(b), providing for excess landing weights, should properly be interpreted and applied according to Bonanza's view of its meaning, which was fifty cents per one thousand pounds of weight in excess of the standard DC-3 weight of 25,000 pounds, times the number of schedules in effect during the billing month, and that the Bonanza representatives would recommend to Bonanza management that the service to Apple Valley be terminated or curtailed if any additional amount of excess landing weight fees were to be demanded by Apple Valley (Tr. 92).

At said meeting, the representatives of Apple Valley Co. concurred, or appeared to concur, in the interpretation of Article 3(b) of the lease by the Bonanza representatives. The Apple Valley Co. representatives did not protest the proposal, nor did they advise that Bonanza would be billed at any other rate. They stated that Bonanza would be advised if they did not concur (Tr. 92).

The proposed F-27A service was initiated at Apple Valley Airport by Bonanza on or about June 1, 1960 (Tr. 39).

From April 22, 1960, until July 1, 1962, the date on which the lease expired, no communication by either party was made to the other concerning the application of the excess weight charge provision, 3(b), of said lease, in the landing of F-27A aircraft (Tr. 92, 97-8).

After June 1, 1960, to July 1, 1962, although Bonanza had no duty by contract or otherwise to do so, Bonanza monthly

advised Apple Valley Co. of the number of landings its aircraft had made during the preceding month, and the type of aircraft which had made the landings, to-wit, F-27A's; and, following receipt of this information, in each of said months, Apple Valley Co. billed Bonanza for space rental and for landing fees at the rate of $1.50 per landing and made no charge for excess weight landing fees whatsoever. That thereafter, and until July 1, 1962, Bonanza paid said statements rendered to it by Apple Valley Co. (Tr. 97-98).

After the expiration of said lease on July 1, 1962, Bonanza continued to submit the same information to Apple Valley Co. and Apple Valley Co. continued to bill in the same manner as heretofore described (Tr. 98).

On December 27, 1963, Arthur M. Taylor, General Counsel for Bonanza, wrote a letter to Walter Cramer, Secretary-Treasurer of Apple Valley Co. stating in part as follows:

> "As you may know, I have written several letters requesting that someone from the Apple Valley Development Corporation and Bonanza Air Lines confer with regard to this company's future operations. Also, as you know, our lease has expired, and we are presently operating on a month-to-month basis predicated by the rates and charges set in the old lease" (Tr. 80, 88).

After receipt by Apple Valley Co. of the letter referred to above, Bonanza continued to submit the same billing information as heretofore set out and Apple Valley Co. continued to

bill Bonanza for space rental and the fee of $1.50 per landing, without any charge for excess weight landing fees, which statements were fully paid by Bonanza for the months of December 1963 and January 1964 (Tr. 98).

On February 6, 1964, a meeting was held between Myron Reynolds, Arthur Taylor and Bernie Novia of Bonanza, and Walter E. Cramer, Vice President of Apple Valley Co., at the office of Mr. Cramer. At said meeting Mr. Cramer, on behalf of Apple Valley Co. alleged that Apple Valley Co. was entitled to excess weight fees under the provisions of the original lease (Tr. 81).

After the meeting of February 6, 1964, Bonanza furnished the usual billing information to Apple Valley Co. as aforesaid, and Apple Valley Co. made a statement to Bonanza for space rental and landing fees at the rate of $1.50 per landing and made no charge for excess weight fees, which statement was paid by Bonanza (Tr. 98).

Apple Valley Co. did not render any statement or billing to Bonanza for the period March 1964, to October 1964, inclusive. The amounts due for these months for space rental and landing fees at the rate of $1.50 per landing were computed by Bonanza, and on December 11, 1964, Bonanza forwarded payment in the amount of $4,924.64 to Apple Valley Co., which check was accepted by Apple Valley Co. (Tr. 98).

Thereafter on December 21, 1964, Apple Valley Co. sent a written statement to Bonanza for the month of November

1964, for building rental of $478.33, and landing fees of $1.50 per landing made during said month and no more. This statement did not include any amount for excess weight landing fees. This statement was paid by Bonanza and Bonanza's check in payment thereof was accepted by Apple Valley Co. (Tr. 98).

Under date of January 18, 1965, Apple Valley Co. sent a written statement to Bonanza for the month of December 1964, for rent in the amount of $478.33, landing fees of $1.50 per landing for one hundred landings, and for excess weight landing fees in the amount of $625.00. This was the first time any statement or demand was made for excess weight landing fees. Shortly thereafter, Bonanza forwarded to Appley Valley Co. a check for space rental and landing fees at the rate of $1.50 per landing, but no more. Apple Valley Co. returned said check to Bonanza and thereafter made no further written statement or demand to Bonanza for space rental, landing fees or excess landing fees for the months of January 1965 to and including November 1965 (Tr. 99).

Bonanza vacated the Apple Valley Airport and made no further landings at that airport after November 30, 1965 (Tr. 99).

The records of Apple Valley Co. record rentals and other receivables in the nature of income as cash items and show the same as income when received; at the end of each of Apple Valley Co.'s fiscal year on its books, rental receivables are accrued and placed in income; but the records of Apple Valley Co. do not reflect any rents receivable, landing fees

receivable, or excess weight landing fees receivable due from Bonanza for any period whatsoever (Tr. 99-100).

SUMMARY OF ARGUMENT AND RESTATEMENT OF SPECIFICATION OF ERRORS.

Appellant's brief argues basically that there was a controverted question of fact concerning the meeting of April 22, 1960. He argues first that it did not occur and that his affidavits controvert its occurrence, and second, that if it did occur, the things done and said at that meeting did not constitute an agreement between the parties.

Appellee's position is simply that first, appellant failed to controvert either the fact of the meeting or the understanding reached at that meeting, and second, that the things done and said at the meeting of April 22, 1960, coupled with the conduct of appellant from and after that time, constituted a waiver of excess weight charges alleged to be due under Paragraph 3(b) of the lease while it was in effect and during the subsequent period.

ARGUMENT

I

THE EVIDENCE SUBMITTED TO THE TRIAL COURT BY APPELLANT DOES NOT CONTROVERT IN ANY WAY APPELLEE'S EVIDENCE RELATING TO THE MEETING OF APRIL 22, 1960.

Throughout the argument in appellant's brief, in both the sections of the brief entitled "Statement of the Case" and that entitled "Argument," appellant constantly contends that the affidavits submitted by Louis Arpin and Arthur Taylor relative to the conference between the parties on April 22, 1960, (Tr. 91, 93) are controverted by the affidavits of William Barris, William Sawyer and Walter E. Cramer presented by the appellant (Tr. 213, 217, 223).

Mr. Taylor's affidavit presents a memorandum from the files of Bonanza in the handwriting of Ralston Hawkins, now deceased, who was General Counsel for Bonanza in the year 1960. This memorandum relates some of the conversation which occurred at the meeting of April 22, 1960 (Tr. 93, 94).

Another person present at the meeting was Louis J. Arpin. His affidavit relates what occurred at the meeting and reads in part as follows:

> "That on April 22, 1960, I was present at a conference at the facilities of the Apple Valley Building and Development Co., Inc., hereinafter called "Apple Valley," in Apple Valley, California,

at which conference also present were Ralston O. Hawkins, Bonanza's General Counsel, William Barris, Apple Valley Airport Manager, and another representative of Apple Valley, whom I believe to have been a Mr. Sawyer.

"That the purpose of the aforementioned conference was to discuss the initiation of F-27A operation in place of DC-3 aircraft. The F-27A at that time, had gross weight of 36,000 pounds. The representatives of Apple Valley were advised of these facts and that it was planned to start the service to the Apple Valley Airport on June 1, 1960. That in connection therewith there was discussed the interpretation and application of Article III-B of Bonanza's operations lease with the representatives of Apple Valley. The representatives of Appley Valley were advised that said Article III-B, providing for excess landing weights, should properly be interpreted and applied according to Bonanza's view of its meaning, which was 50¢ per 1,000 pounds of weight in excess of the standard DC-3 weight of 25,000 pounds times the number of schedules in effect during the billing month, and to further advise the representatives of Apple Valley that we would recommend to Bonanza management that the service to Apple Valley be terminated or curtailed if any additional amount of excess landing weight fees were to be demanded.

"That to the best of my recollection, the representatives of Apple Valley concurred or appeared to concur in our interpretation of Article III-B. They did not protest our proposal, nor did they advise that Bonanza would be billed at any other rate; that they stated that Bonanza would be advised if they did not concur; that thereafter and until the 31st day of October, 1963, when I ceased to be associated with Bonanza in my capacity as Assistant to Vice President - Operations, I heard nothing whatsoever further from representatives of Apple Valley with respect to the application of any excess weight landing rates and charges of any kind." (Underscoring supplied) (Tr. 91, 92).

Appellant urges that the affidavits of William Barris and William Sawyer controvert the affidavits of Arthur Taylor and Louis Arpin. They do not. Neither affidavit denies that the meeting took place. Instead they aver that Barris and Sawyer have no recollection of the meeting in the following words:

(From the affidavit of William Barris) "I have personally examined all the records of Apple Valley Building and Development Company with respect to the lease and use of Apple Valley Airport by Bonanza Air Lines. There is no record, nor do I have any recollection of having attended any meeting on April 22, 1960, in the company of Ralston Hawkins, Louis Arpin, William Sawyer, nor anyone else." (Emphasis supplied) (Tr. 217).

(Mr. Sawyer's affidavit) "I have no recollection of having attended any meeting on April 22, 1960, in the company of Ralston Hawkins, Louis Arpin, William Barris, nor anyone else." (Emphasis supplied) (Tr. 223).

When an event is established by competent evidence, the failure of witnesses on the other side to recollect the event is entitled to no weight and cannot raise an issue of fact.

Reid v. Holcomb, 63 Cal. App. 89,
218 Pac. 76 (1923)

Griffith v. San Diego College of Women,
___ Cal. App. 2d ___, 280 P. 2d 203 (1955)

Port of Palm District v. Goethals, (C.C.A. 5, 1939)
104 F. 2d 706, 709-710

Idaho Merc. Co. v. Kalanquin, 8 Idaho 101,
66 Pac. 933

Herman Lumber Company v. Bjurstron,
74 Misc. Rep. 93, 131 N.Y.S. 689

Inman's Administratrix v. United States Rys. Co.
of St. Louis, 157 Mo. App. 171, 137 S.W. 3

Eckhart v. Century Fire Insurance Company,
147 Iowa 507, 124 N.W. 170, 171

Title Guarantee & Surety Co. v. Poe,
138 Md. 446, 114 A. 481

Railsback v. Patten, 34 Neb. 490,

52 N.W. 277

Corpus Juris, Vol. 23, p. 42

Corpus Juris, Vol. 32-A (Evidence) p. 724.

Without a denial that the meeting took place and without a denial of the facts stated in Mr. Louis Arpin's affidavit, appellant has no standing before this Court to argue that an issue of fact exists either as to the meeting or what therein transpired.

As must be evident, many of appellant's conclusions, based upon the alleged controversion of the evidence relating to the meeting of April 22, 1960, must fall. This would include the assertion that Apple Valley Co. was unaware of the weight of the F-27A until February of 1964, for at the meeting of April 22, 1960, duly authorized representatives of Apple Valley Co. were specifically made aware of the heavier weight of the F-27A and the excess weight clause in the lease (Tr. 91). The whole course of action of Apple Valley Co. from that date forward must, and has to be, considered in the light of this meeting. The company was happy to have the service and so far as billing for the excess weight on a scheduled basis, since the airline was only operating two or three schedules a month into Apple Valley, the resultant monthly charge would have been de minimis - eleven or sixteen and one-half dollars per month on the basis of fifty cents per thousand pounds above

25,000 pounds at the level of 36,000 pounds certified weight of an F-27A aircraft for 2 or 3 schedules per month.

II

THE CONDUCT OF APPELLANT AT AND AFTER THE MEETING OF APRIL 22, 1960, CLEARLY AMOUNTED TO A WAIVER OF EXCESS WEIGHT CHARGES.

It is, of course, obvious that the agreement reached at the meeting of April 22, 1960, was not to pay excess weight charges on any basis, but rather that in the event that Apple Valley Co. decided to assert its rights under any interpretation of this clause in the lease, it would notify Bonanza so that Bonanza could take appropriate steps to protect itself by securing the approval of the governmental agencies which regulated air carriers to curtail or discontinue service. In this instance, failure to notify amounted to a notification that the provisions of this clause of the lease were not going to be enforced by Apple Valley Co., and this indeed was the case. It is undisputed that Apple Valley Co. allowed Bonanza to institute F-27A service in June of 1960, and that such service was continued to the end of the term of the lease without any claim for excess weight charges. It is undisputed that after the first claim for such charges, long after the lease had expired, in February of 1964, Apple Valley Co. accepted the space rental and landing fee checks computed without regard to

excess weight provisions of the lease. It is also undisputed that Apple Valley Co. never accrued any liability for excess weight charges, even after Bonanza had terminated its tenancy with Apple Valley Co.

Under these undisputed facts, the Trial Court applied the law as enunciated in the case of Bettelheim v. Hagstrom Food Stores, Inc., 113 Cal. App. 2d 873, 249 P. 2d 301 (1952), a case on all fours with the case at bar. In that case the plaintiff-lessor had entered into a three-year sublease with the defendant-lessee which provided for a rental of 2% of defendant's gross receipts, with a minimum monthly rental of $500. The lease also contained a provision that any holding over would be deemed a month-to-month tenancy at a monthly rental of no less than an amount equal to 5% of the gross receipts with the same minimum rental. A short time before the lease expired, plaintiff's agent and defendant's president had at least four conversations regarding a new lease wherein defendant indicated it would be willing to stay under the same terms and conditions it had during the three year period and would remain in possession only on those terms because of parking conditions. Plaintiff's position was unclear and certainly it did not agree specifically to allow defendant to continue on the old basis; its agent stated that it was primarily interested in getting defendant to take over either a portion or all of the time left in the master lease. No new lease was executed. Defendant held over for eight months beyond the term of the

lease and made the rental payments for the holding over period by check in the same manner it had during the original lease and according to the terms thereof. Plaintiff sued for the additional 3% of the gross receipts for the eight month hold-over period. The Appellate Court indicated that although there was no agreement, either express or implied, to let the defendant continue on under the old terms and that although the most that was done in this respect was to acquiesce in its remaining in possession without any agreement as to the terms, plaintiff was estopped from asserting any claim for rental in excess of the amounts received. This was because plaintiff's knowledge of the facts and acceptance of the payments and acquiescence in defendant's continued occupancy of the premises induced defendant to remain during the hold-over period. It might be noted that the Court came to this conclusion despite the fact that there were two "no waiver" clauses in the lease.

Section 2076 of the California Code of Civil Procedure provides as follows:

> "The person to whom a tender is made must, at the time, specify any objection he may have to the money, instrument or property, or he must be deemed to have waived it; and if the objection to the amount of money, the terms of the instrument, or the amount or kind of property, he must specify the amount, terms, or kind which he requires or be precluded from

objecting afterwards."

See also Julian v. Gold, 214 Cal. 74, 3 P. 2d 1009; Sinnige v. Oswald, 170 Cal. 55, 148 Pac. 203; Taylor v. Taylor, 39 Cal. App. 2d 518, 103 P. 2d 575; California Evidence Code §636; Cowell v. Snyder, 15 Cal. App. 634, 115 Pac. 961; and Colyear v. Tobriner, 7 Cal. 2d 734, 82 P. 2d 741.

In Cowell v. Snyder, supra, a tenant for years held over after having been seasonably notified that the rent would be raised if there was to be a hold-over. It was said that if the tenant does not refuse to be bound by such new terms, by his silence he will be deemed to have acquiesced in the changed contract and become bound. However, if he refuses to pay an increased rental, he becomes a trespasser and liable for reasonable rental value in damages. Then if the landlord accepts rental as tendered without the increase, the landlord is bound for the new period.

After proper notice to pay rent or quit, a tenant becomes a tenant at sufferance and he is liable for the reasonable value of the use, or perhaps for the rate of rent paid during the term. Colyear v. Tobriner, 7 Cal. 2d 735, 62 P. 2d 741, 745. Of course the tenancy at sufferance under the rule of the Cowell and Colyear cases, supra, only obtains if "reasonable" notice is given by the landlord to the tenant that the rent will be raised. No such notice was given herein. The lease ran its course to July 1, 1962, with no action on the part of appellant at that time or thereafter to

assert its known rights. The conduct of appellant from and after June 1, 1960, can only be construed as a waiver calculated to keep a valuable tenant in possession. It succeeded in this strategy until November 1965. Then, and only then, it brought this suit, even though a substantial portion of its claims was barred by the statute of limitations. Appellant's conduct speaks for itself. So held the Trial Court.

CONCLUSION

There is no material dispute as to the facts in this case. Appellant's affidavits, by asserting a lack of recollection, do not controvert the specific factual affidavits of appellee in any material regard. Appellant, by its conduct at and after the meeting of April 22, 1960, intended to and did waive its right to receive excess weight fees. The judgment of the Trial Court should be affirmed.

Respectfully submitted,

MAXWELL & SHEAHAN
ARTHUR M. TAYLOR

By CLYDE R. MAXWELL

Attorneys for Appellee

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Clyde R. Maxwell

CLYDE R. MAXWELL